No. 91-428

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PHILIP W. BARNES, COMMISSIONER OF TEXAS STATE BOARD OF INSURANCE, *et al.*,
Petitioners,

v.

E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL & SURGICAL INSURANCE PLAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a Texas tax—which concededly "relates to" employee benefit plans within the meaning of ERISA's preemption provision, and which petitioner no longer defends as applied to respondents—would be valid if applied to other kinds of plans.

2. Whether for purposes of the Tax Injunction Act, and contrary to rulings by both state and federal courts, respondents have a "plain, speedy and efficient remedy" in Texas state court for challenging the tax.

3. Whether the Eleventh Amendment prevents a federal court from ordering restitution of state taxes collected in violation of federal law, where the federal statute expressly makes a state answerable in federal court for equitable remedies for such unlawful state taxes and where there is no adequate refund remedy in state court.

4. Whether the district court abused its discretion in awarding pre-judgment interest.

RULE 29.1 STATEMENT

A list of respondents' parent companies and subsidiaries (except wholly owned subsidiaries) is set forth at Appendix C, *infra*, 10a-12a.

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

Respondents are a group of "self-insured" benefit plans that provide medical, dental, hospital, accident, death, and disability benefits for employees in the State of Texas. Each plan qualifies as an "employee welfare benefit plan" within the meaning of Section 3(1) of the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. § 1002(1). This case arises out of respondents' challenge to the Texas Administrative Services Tax Act (ASTA), Tex. Ins. Code Ann. art. 4.11A (Vernon Supp. 1987-1988) (reprinted in pertinent part in Appendix A, *infra*, 6a), on the ground that it is preempted by ERISA.

1. *The Tax.*

ASTA, which went into effect on September 1, 1987, imposes a tax on the administration of benefit plans that is measured by the amount of benefits paid. In two parallel sections, the statute provides that each "insurance carrier" (sec. 1) or "person" (sec. 2) "receiving any form of administrative or service fee . . . for performing or providing any service . . . relating to any . . . benefit plan . . . shall pay . . . an annual tax on the gross amount of administrative or service fees received." App., *infra*, 1a-3a.

The tax base—"gross amount of administrative or service fees"—is defined much more expansively than its language would suggest. The term includes not only the "gross amount of all consideration . . . received by the carrier or other person," but also "the total amount of all claims and benefits paid" under the plan. Sec. 3(2); App., *infra*, 3a-4a. The statute explicitly imposes the tax on benefit plans, providing that, where an insurance carrier or other person does not receive any fees, "there is imposed on each plan . . . an annual tax equal to 2.5 percent of the gross amount of administrative or service fees and that plan shall pay the tax to the State." Sec. 4(c); App., *infra*, 5a.

2. *The Proceedings Below.*

The convoluted procedural history of this case both complicates the issues before the Court and sharply reduces their significance beyond the scope of this particular dispute.

a. Under the threat of substantial penalties, respondents paid under protest to the Texas authorities the tax imposed by ASTA on the amount of benefits paid out by the plans, as required by section 4(c) of that Act. Thereafter, in May 1988, they brought suit in the Texas District Court of Travis County, seeking injunctive relief

against the collection of the ASTA tax and a refund of amounts already paid.[1] Respondents argued that ASTA "relate[s] to" an ERISA plan (both because it computes a tax on the basis of benefits paid out by an ERISA plan and because it imposes that tax on the plan or its fiduciaries), and that the tax is therefore preempted under section 514(a) of ERISA, 29 U.S.C. § 1144(a).

b. Two months earlier, groups of participants, trustees, and sponsoring employers of other plans—but not, as in the present case, the plans themselves—had commenced several different suits in the United States District Court for the Western District of Texas, challenging ASTA on similar grounds. Those suits ultimately were consolidated in the district court and decided under the caption of *Birdsong v. Olson*. The plaintiffs in one of the pre-consolidation cases, *American Airlines, Inc. v. Lee*, sought to deposit their tax payments into the registry of the court. They maintained both that there was no refund remedy in state court for ASTA taxes and that only the plans themselves, not the sponsoring employers, qualified as "taxpayers" with standing to invoke Texas tax remedies. *See* Pet. App. 38a. The State responded that there was a refund remedy and that the employers, not the plans, were the taxpayers. It cited for this proposition a Texas regulation that makes the person "who first collects . . . the contribution . . . primarily responsible for the tax." April 29, 1988, State of Texas' Response at 4-6, citing Tex. Admin. Code § 7.1704(a).[2]

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[1] Respondent LaQuinta did not file an action in state court. In federal court, it filed suit separately from the other respondents, and the two cases were consolidated on appeal. For convenience, we will use the term "respondents" generally, without qualification for the differences in LaQuinta's status. We also note that respondents Texas Carpenters Health Benefit Fund and Texas Carpenters Health Benefit Trust are not parties to this filing but are separately represented by other counsel.

[2] For the convenience of the Court, we are lodging with the Clerk copies of the pertinent portions of the State's response and of the other record materials cited in this brief that are not reprinted in the appendices.

c. The State's assertion in the *American Airlines* case —that the plans themselves were not the "taxpayers"— cast doubt on the ability of respondents to obtain relief in state court. Relying on essentially the same arguments made by the federal court plaintiffs, respondents filed a motion asking the Texas district court to allow respondents to deposit future tax payments into the court. The State opposed the motion, but did not concede that respondents had an adequate state court remedy.

The Texas district court agreed with respondents that they had no adequate refund remedy in Texas court. In September 1988, it granted a temporary injunction, allowing respondents to pay the ASTA tax into the registry of the court as it came due. App. B, *infra*, 7a-9a. The court explained that, if the State were to collect the tax, it would "alter the status quo and tend to make ineffectual a judgment in favor of Plaintiffs, in that (1) Defendants refuse to recognize Plaintiffs' standing to protest and obtain a refund as taxpayers and (2) the taxes paid under Article 4.11A are not subject to a statutory refund procedure or any legislative appropriation for refund judgments and that . . . Plaintiffs will be without any adequate remedy at law in that Plaintiffs will be without means to recover the taxes." *Id.* at 8a. The State took an interlocutory appeal from this order, but that appeal was stayed pending further developments in the federal court.[3]

d. In the *Birdsong* litigation, the federal district court similarly concluded that the plaintiffs had no "plain, speedy and efficient" remedy in state court within the meaning of the Tax Injunction Act, 28 U.S.C. § 1341. In November 1988, in an unreported decision, it accordingly denied the State's motion to dismiss the suits on Tax

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[3] Contrary to the State's assertion (Pet. 11, 26-27), the Texas district court did not reach the merits and did not hold that ASTA is preempted by ERISA. It merely authorized respondents to pay the tax into the court as it came due, rather than into the State treasury.

Injunction Act and Eleventh Amendment grounds. Pet. App. 29a-47a. The court gave several reasons for its conclusion (*id.* at 40a): (1) ERISA preemption prevents the state courts from declaring that ASTA violates ERISA; (2) "Plaintiffs, to the extent they are considered nontaxpayers or nontaxable, lack standing to file a tax protest suit under ASTA section 9 or seek injunctive relief under section 112.101 of the Tax Code"; (3) it is "speculative" whether the plaintiffs could secure special legislative consent to sue for a refund; and (4) "Plaintiffs have demonstrated through the inconsistent positions taken" by the State in the Texas and federal proceedings (see pp. 10-11, *infra*) "that it is unlikely that a refund could be obtained even if suit were allowed." The court added that, in any event, there was "a sufficient amount of uncertainty concerning each of the state remedies described above as to make them speculative." Pet. App. 40a. With respect to the Eleventh Amendment, the court concluded that ERISA had abrogated the State's immunity in the limited context of a "claim for restitution of taxes paid pursuant to ASTA." *Id.* at 45a.

Subsequently, in February 1989, the court granted the *Birdsong* plaintiffs' motion for summary judgment. *Birdsong v. Olson*, 708 F. Supp. 792 (W.D. Tex. 1989). Relying heavily on *General Motors Corp. v. California Board of Equalization*, 815 F.2d 1305 (9th Cir. 1987), *cert. denied*, 485 U.S. 941 (1988), the court concluded that ASTA "imposes a tax that clearly relates to ERISA-covered employee welfare benefit plans, and that the tax is preempted by ERISA." 708 F. Supp. at 801. The court declared ASTA invalid, enjoined the State from making further efforts to collect the tax from the plaintiffs, and ordered the return of tax payments already made. The State appealed, but the court of appeals dismissed the appeal for lack of jurisdiction because the notice of appeal was untimely filed. *Birdsong v. Wrotenbery*, 901 F.2d 1270 (5th Cir. 1990).

e. In the wake of the district court's ruling in *Birdsong*, respondents (with LaQuinta filing separately) brought the instant cases in the federal district court. Relying on its earlier decisions in *Birdsong*, the court denied the State's motions to dismiss for lack of jurisdiction (Pet. App. 26a; 27a-28a) and granted summary judgment in favor of respondents (*id.* at 48a-54a; 55a-62a). The court enjoined the State from enforcing the tax against respondents and ordered the return of the more than $1.7 million in taxes already paid. *Id.* at 53a-54a; 61a-62a; *see id.* at 51a; 58a. Thereafter, the court granted respondents' motions for pre-judgment and post-judgment interest. *Id.* at 63a-69a; 70a-72a.

f. After dismissal of the appeal in *Birdsong*, the court of appeals heard this case and affirmed. Pet. App. 1a-13a. The court stated that ERISA preempts a state court action by a taxpayer to challenge a state tax as preempted by ERISA; accordingly, the Tax Injunction Act is inapplicable because respondents have no effective remedy in state court. Pet. App. 6a. On the merits, the court concluded that "it is apparent that ASTA 'relates to'" ERISA plans—both because it is calculated on the basis of benefits paid and because it will directly affect the relationships among the employer, the plan, the plan fiduciaries, and the beneficiaries. *Id.* at 8a-9a. In a separate concurring opinion, Judge Brown elaborated on the Tax Injunction Act issue, explaining that Texas Supreme Court decisions leave no room for an adequate state remedy. *Id.* at 11a-13a. The court separately affirmed the interest award. *Id.* at 14a-16a.

The court of appeals denied rehearing but granted the State's request for a 30-day stay of the mandate, pending the filing of a certiorari petition. *See* Fed. R. App. P. 41(b). The court subsequently denied the State's request to extend that 30-day period. Thereafter, on July 29, 1991, the State applied to the Circuit Justice for a further stay of the court of appeals' judgment. On August

2, 1991, without hearing from respondents on the stay application, Justice Scalia ordered the judgment below stayed pending the filing of a certiorari petition and ultimate resolution of the case. Pet. App. 17a-25a.

ARGUMENT

In its petition, the State of Texas challenges both the jurisdiction of the federal courts to entertain this suit (either for injunctive or monetary relief) and the merits of the court's ruling that ASTA violates federal law. This case is an inapt vehicle for resolving the issues presented by the petition. First, the State has abandoned its defense of ASTA as applied to these respondents, essentially ending the underlying controversy between the parties on the merits. Second, regardless of how the federal issues may be resolved, the jurisdictional holding below is supported by grounds unique to Texas law. Before this Court can reach the questions presented in the petition, it will have to consider detailed questions of state procedure—and disagree with the answers already given to those questions by both the state and federal courts. Third, nothing in the court of appeals' decision conflicts with any decision of another court of appeals or of this Court, and there is consequently no reason for further review.

1. *Resolving the Jurisdictional Questions Presented in the Petition Will Not Affect the Ultimate Resolution of the Dispute Between the Parties.*

Respondents brought this action to resolve a major tax controversy with the State of Texas—whether ERISA prohibits the State's efforts to tax them under ASTA. Throughout this litigation, the State has repeatedly and vigorously defended the validity of its tax in full, albeit without success in any forum. In this Court, however, the State has changed its tune and essentially abandoned its defense of the statute on the merits *as applied to these plans*. As a result, the basic controversy between the

parties that lies at the heart of this litigation no longer exists. Regardless of the resolution of the jurisdictional questions presented in the petition, the parties now agree that the ultimate result should be to excuse respondents from paying the ASTA tax and to refund the tax they have already paid under that statute. This Court should not exercise its certiorari jurisdiction to resolve procedural questions that will not affect the ultimate outcome of the case.

Texas now acknowledges that ASTA is invalid, at least in part, phrasing the question for this Court as "whether *any part* of ASTA represents a valid exercise of state authority." Pet. 35 (emphasis added); *see also* Pet. i. The State "concede[s] . . . that ASTA relates to ERISA" (Pet. 35) and therefore falls within ERISA's preemptive scope as a state statute that "relate[s] to" a covered employee benefit plan. Section 514(a). Invoking ERISA's "insurance exception" (section 514(b)(2)), however, the State argues that "third party administrators can be considered part of the insurance business for purposes of state regulation" (Pet. 37) and that these administrators "are often licensed insurance companies" (Pet. 36).

These partial defenses have never been raised before in this litigation; indeed, they mark a complete reversal of the State's prior position. In the court of appeals, the main subsection of the State's brief defending the statute was titled "ASTA does not relate to ERISA" (C.A. Br. 38)—a position the state now expressly repudiates.[4] And the State argued that ERISA's insurance savings clause

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[4] As noted above, the *Birdsong* case was briefed in the court of appeals but was ultimately dismissed because the notice of appeal was untimely. The parties then agreed to adopt the appellate briefs in *Birdsong* as their main briefs in this litigation; each side also filed a short supplemental brief. "C.A. Br." refers to the briefs filed in the *Birdsong* case in the court of appeals and adopted by the parties for this case. "Supp. Br." refers to the supplemental briefs filed in the court of appeals in this case.

justified taxation of "first party administrators." *Id.* at 41-42. Even if the State's new arguments had merit, which they do not, it would be inappropriate for this Court to entertain them in the first instance. *See, e.g., United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).

More importantly, these new arguments have no apparent applicability to respondents, who are neither third-party administrators nor insurance companies. The State thus seeks to litigate in this Court abstract issues not presented in this case—which accordingly can provide no basis for altering the final outcome. In sum, the State's about-face on the validity of ASTA has eliminated the underlying controversy between the parties to this litigation.

2. The Tax Injunction Act Is Inapplicable Because, as Both the State and Federal Courts Concluded, Texas Procedures Do Not Provide a Plain, Speedy, and Efficient Remedy for Unlawful Taxation Under ASTA.

The State presents the question whether "ERISA preempt[s] a State's general tax remedies, thereby . . . making the Tax Injunction Act 'inapplicable.'" Pet. i. This description implies that the jurisdictional issues in this case turn entirely on a construction of ERISA. But in fact the Tax Injunction Act dispute has always centered on the procedural details of Texas tax law, not on any contested construction of federal law. Despite an ever-changing panoply of interpretations of Texas law proffered by the State, both the federal district court (Pet. App. 40a) and the state district court of Travis County (App., *infra*, 8a) concluded that Texas law does not provide respondents with a plain, speedy, and efficient remedy in state court; therefore, by its terms the Tax Injunction Act does not bar this action. Unless this Court disagrees with that conclusion regarding Texas law, it has no basis for reversing the judgment of the court of appeals on the Tax Injunction Act issue.

The history of this litigation illustrates the uncertainty of an adequate remedy in the Texas courts. As we have noted (p. 3, *supra*), early in this litigation the *American Airlines* plaintiffs asked the federal district court to permit them to pay their tax into court. Pointing to the absence of any specific appropriation or refund provision, the plaintiffs argued that it was uncertain whether Texas law would permit ASTA taxes to be refunded if they paid the tax in the normal course. The State disagreed. Relying on the affidavit of an official of the state Comptroller's Office, T.R. Mallett, the State argued that ASTA refunds were authorized by Tex. Gov't Code § 403.076. *See* April 29, 1988, State of Texas' Response, at 16. That statute clearly provided refund authority for many kinds of taxes listed there but did not include ASTA in the list.[5] The federal court accepted the State's representation as demonstrating that plaintiffs would not suffer irreparable injury if they paid the tax to the State, and the court therefore denied the requested relief. May 13, 1988, Order, at 6.

When the scene shifted to state court, however, the Travis County district court concluded that Texas law did *not* provide a refund remedy. The State there had opposed respondents' motion to allow them to deposit their tax payments into court, putting on Mr. Mallett to testify that Texas law afforded a refund remedy for ASTA overpayments. This time, however, Mr. Mallett testified, contrary to the State's position in federal court, that section

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[5] Although since amended, section 403.076(a) provided at that time:

> The comptroller shall pay from available funds claims for refunds of taxes collected under:
>
> (1) The Alcoholic Beverage Code;
>
> (2) Sections 11 and 12, Article 1.14-1; Section 12, Article 1.14-2; and Articles 4.10 and 4.11, Insurance Code; and
>
> (3) Section 1, Chapter 619, Acts of the 51st Legislature, Regular Session, 1949 (Article 4769, Vernon's Texas Civil Statutes).

403.076 does *not* provide authority to refund ASTA tax payments (Sept. 12, 1988, Hearing Tr. 156). He also acknowledged that section 29 of the General Appropriations Act (70th Leg., 2d C.S. Ch. 78, Art. V, Sec. 29, 1987 Tex. Gen. Laws 253, 846) does not permit disbursement of state funds without a specific provision authorizing a refund (Tr. 152). Mr. Mallett maintained, however, that Tex. Gov't Code § 403.077 provides refund authority for any unlawful tax, including ASTA (Tr. 157-158, 164, 168).

The state court disagreed with the State's new theory. The court concluded that "the taxes paid under Article 4.11A are not subject to a statutory refund procedure or any legislative appropriation for refund judgments and that unless Defendants are deterred from [collecting the tax], Plaintiffs will be without any adequate remedy at law in that Plaintiffs will be without means to recover the taxes paid pursuant to Article 4.11A." App., *infra*, 8a.

In the wake of these developments, the federal district court reconsidered its prior analysis of the state procedures when called upon to rule on the State's motion to dismiss the *Birdsong* litigation. The court remarked that it had expressly relied on Mr. Mallett's affidavit and the State's representations with respect to section 403.076 (Pet. App. 38a); "[n]ow that the State has abandoned section 403.076 as a basis for a refund," the court proceeded to consider the State's new contention that ASTA refund authority resides in section 403.077 (Pet. App. 39a). That section authorizes a refund of money collected "through mistake of fact or law," but it has been authoritatively construed by the Texas Supreme Court *not* to apply to a legislative enactment of an unlawful tax. *See, e.g., Bullock v. Hewlett-Packard Co.*, 628 S.W.2d 754, 757 (1982). Accordingly, the federal district court agreed with the state court that section

403.077 does not provide a remedy. For that and other reasons, it concluded that the plaintiffs had no "plain, speedy, and efficient" refund remedy in state court and therefore that the Tax Injunction Act was not a bar to federal jurisdiction.

Although the court of appeals did not discuss these defects in state procedures as they relate to ASTA, they remain obstacles to the State's attempt to invoke the Tax Injunction Act. The State has never adequately responded to the decisions of the federal and state district courts on this point. In its brief in the court of appeals, the State renewed its reliance on section 403.077 (ignoring the case law on which the district court based its rejection of the contention), and it argued that section 29 of the General Appropriations Act alone confers a right to a refund—an assertion that directly contradicts Mr. Mallett's testimony. C.A. Br. 29-30. *See also* Pet. 28 n.9. It also raised a new argument—that section 112.060, which directs the treasurer how to make refunds, is "self appropriating," even though Texas case law requires a more specific appropriation for the payment of the judgment. C.A. Br. 28-29; *see Norris v. Bullock*, 580 S.W.2d 812, 813-814 (Tex. 1979); *Jessen Associates, Inc. v. Bullock*, 531 S.W.2d 593, 599 (Tex. 1975). In addition, the State argued that the plaintiffs could seek a special resolution from the Texas legislature allowing them to bring suit (C.A. Br. 23), but that route clearly is too speculative to satisfy the standard of the Tax Injunction Act. In this Court, the State adds nothing, except to assert that its "general tax remedies are intended, and must be construed, to give real relief to aggrieved tax litigants." Pet. 28.

Not only is there uncertainty over the existence of a state court remedy, but there is also a question concerning respondents' standing to invoke whatever state remedy does exist. The State repeatedly asserted in the *Birdsong* litigation that the employers are the "taxpay-

ers" who can invoke Texas procedures; the State has argued that ERISA plans are not ASTA taxpayers, despite the plain language of section 4(c). *See* C.A. Br. 12. The district court concluded that the Tax Injunction Act is no bar to federal jurisdiction here because "non-taxpayers" are "unable to file a protest suit under ASTA section 9(a) or seek injunctive relief under section 112.101 of the Tax Code." Pet. App. 36a. There is no reason for this Court to disturb that conclusion.

The State's position on the standing question, like its positions on the merits and on the source of a refund remedy, has undergone a striking transformation. In the court of appeals, the State initially maintained that sponsoring employers, not the plans themselves, are the proper taxpayers under ASTA, and it flatly asserted that plaintiffs who "are not taxpayers . . . cannot maintain an action in state court." C.A. Br. 32. In its supplemental brief below, the State began to qualify its position. It reiterated that "[t]he protest [refund] remedy is available to 'a person who is required to pay' the tax," but it suggested that the Texas courts have not been "especially stringent" in enforcing that limitation. Supp. Br. 4-5.[6] In this Court, the State for the first time takes the opposite position (Pet. 27-28): "Under Texas law the 'taxpayer,' for purposes of maintaining a tax protest suit, is the person who paid the tax rather than the person who should have paid." These shifting positions surely give no assurance that respondents have a plain remedy in state court.[7]

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[6] The State relied for that proposition on a case where a court rejected the State's effort to have a refund suit dismissed on the ground that the plaintiff mistakenly had sued in the name of his corporation, rather than in his own name. *See* Supp. Br. 4-5.

[7] The State has shown consistency in its lack of sympathy for respondents' difficult situation under Texas procedures. To the extent the State's position that they are not ASTA "taxpayers" leaves respondents without a state remedy, the State has viewed that

In sum, the state district court of Travis County has ruled that respondents do not have a certain refund remedy in the Texas courts. And, although the State has altered its position several times, it has never advanced a convincing theory for the availability of a refund in state court. Moreover, the State has repeatedly cast doubt upon the standing of respondents to seek relief under Texas law. In these circumstances, the district court correctly concluded that respondents' ability to obtain a refund in state court is, at best, "uncertain[]" and "speculative." Pet. App. 40a. That kind of remedy "is not adequate to bar federal jurisdiction." *Franchise Tax Board v. Alcan Aluminium Ltd.*, 110 S. Ct. 661, 667 (1990).

3. *Prudential Considerations Counsel Against Further Prolonging This Litigation.*

Even if the existence of a state remedy were more certain, it would not be appropriate for this Court to exercise its certiorari jurisdiction for the purpose of sending this litigation back to state court at this late date. Respondents have been taken on a tour of the federal and state court systems while the State has experimented with different theories on jurisdiction and the merits to try to rescue a patently unlawful

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result as respondents' own fault for paying taxes that assertedly were owed by the employer. At the hearing before the Texas district court, the State argued that respondents could not bring a refund suit, explaining: "[I]f the plaintiffs are paying the tax on behalf of someone else, they have recourse against the person for whom they paid the tax. And their recourse is there, not against the State of Texas." Sept. 12, 1988, Hearing Tr. 53. In this Court, the State still clings to its contention that respondents created their own problems by following the command of section 4(c) that the plans must pay the tax (Pet. 30): "[T]he confusion fostered by persons paying taxes which they clearly do not owe cannot be used to subvert the availability of tax remedies which exist as a matter of law." Indeed, the State's current view is that, because respondents should have ignored the statutory requirement that they pay the tax, any damages they suffered were "incurred voluntarily" and "self-inflicted." Pet. 41, 42.

tax. Now that it has lost the case on the merits, the State essentially concedes that the tax is unlawful as to respondents, but it asks this Court to force them to start over again in state court to get their remedy.

Respondents do not care (and never have cared) whether the relief to which they are entitled is ordered by a federal or a state court. At this point, their interest in defending the jurisdictional holding below is simply to put an end to this wasteful litigation and the State's efforts to subject them to an invalid tax. In its petition (at 18 n.5), the State explains what appears to be its fiscal interest in sending this case back to state court—to avoid paying refunds to taxpayers who did not adequately protect themselves by protesting the tax at the time of payment. The State's desire to retain as a windfall a portion of the invalid ASTA taxes already collected—*from other taxpayers*—is not an adequate justification for exercising this Court's discretionary jurisdiction and prolonging this litigation.

4. ***The Federal Courts Have Exclusive Jurisdiction Over an Action Challenging the Validity of a State Tax Under ERISA.***

a. Even apart from these prudential considerations, there is no cause for review by this Court because the court of appeals' resolution of the questions presented in the petition does not conflict with established law. Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), authorizes any fiduciary to bring a civil action "to enjoin any act or practice which violates any provision of this title." Section 502(e)(1), 29 U.S.C. § 1132(e)(1), provides that such suits fall within the "exclusive jurisdiction" of the federal district courts. The recognized preemptive effect of these ERISA provisions amply supports the court of appeals' conclusion that the Tax Injunction Act is no bar to respondents' lawsuit.

This Court has made clear that "ERISA's civil enforcement remedies were intended to be exclusive" and

therefore preempt state laws that otherwise might provide a concurrent cause of action. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). "Congress clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle . . . and that varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress." *Id.* at 52. Thus, when an enforcement action is available under section 502(a) of ERISA, "the federal remedy provided by that provision displace[s] state causes of action." *Id.* at 57.

Although the Court in *Pilot Life* was specifically addressing an ERISA action brought under section 502(a)(1) by beneficiaries alleging improper processing of benefit claims, the preemption of state causes of action applies equally to other civil enforcement actions under section 502(a). In *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 485 (1990), the Court reaffirmed the general proposition that "Congress intended § 502(a) to be the exclusive remedy for rights guaranteed under ERISA." Expanding upon *Pilot Life*, the Court remarked that "there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek 'pension benefits.'" *Id.* at 486. Because "the Texas cause of action [for wrongful termination based on tort and contract theories] purport[ed] to provide a remedy for the violation of a right expressly guaranteed by [ERISA] and exclusively enforced by § 502(a)," it was preempted by federal law. *Id.*

These principles strongly suggest that respondents cannot bring an action under state law to invalidate the ASTA tax. The terms of section 502(a)(3) encompass a suit to enjoin the collection of a tax that contravenes ERISA's protection of benefit plans (and to obtain other appropriate equitable relief). The act of collecting the tax would violate the ERISA provision superseding state laws that "relate to any employee benefit plan," includ-

ing "any State tax law relating to employee benefit plans." Section 514(a), (b)(5)(B)(i). Indeed, this Court has recognized that section 502(a)(3) empowers a plan to sue state tax authorities to enjoin actions that interfere with the plan's federal rights (subject to possible limitations of the Tax Injunction Act). *See Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 19-20 & nn. 20-21 (1983).

If the action to invalidate the ASTA tax can be brought under section 502(a)(3), any parallel state cause of action should be preempted. And because jurisdiction over the ERISA cause of action lies exclusively in federal court, respondents would have no remedy that they can pursue in state court. Accordingly, the federal court action is not barred by the Tax Injunction Act; by its terms, the Act does not apply if there is no plain, speedy, and efficient remedy in state court.

As Judge Brown explained in his concurring opinion below, the Texas courts have provided additional guidance on whether they would entertain a claim by respondents that the ASTA tax is invalid under ERISA. The Texas Supreme Court has ruled that, where a claim falls within the exclusive jurisdiction provision of ERISA, "a successful assertion of ERISA preemption would deprive state courts of subject-matter jurisdiction to hear the claim." *Gorman v. Life Ins. Co. of North America*, 811 S.W.2d 542, 547 (Tex. 1991), *cert. denied*, No. 90-1984 (Oct. 7, 1991). The *Gorman* rule is fully applicable where the claim is brought under the rubric of state law; a state claim "that relates to the administration of an ERISA plan falls within the exclusive jurisdiction of the federal courts, and state courts therefore may not hear such claims." *Id.*

The effect of this jurisdictional holding is to deny respondents a remedy in state court. If they commence an action in state court arguing that ASTA is preempted by ERISA, and if the Texas court agrees

with that assertion, the Texas court appears bound under *Gorman* to bow to ERISA's exclusive jurisdiction provision and to dismiss the case for lack of subject matter jurisdiction in state court. If so, the plaintiffs cannot get relief in state court, and the Tax Injunction Act does not bar them from suing in federal court. *See* Pet. App. 11a-13a (Brown, J., concurring).

It is no answer for the State to argue that "state court decisions do not conclusively decide questions of federal jurisdiction" (Pet. 26). Even if *Gorman* were incorrect, it would still stand as an obstacle to relief in the state courts. Once the Texas courts have held that they cannot afford relief upon a claim founded in ERISA, a claimant should not be forced to litigate through the state system in the hope of reversing that holding. That course of action provides no certain remedy—and manifestly no "speedy or efficient" remedy; accordingly, the Tax Injunction Act does not require it.

Relying on *Franchise Tax Board v. Construction Laborers Vacation Trust*, *supra*, the State argues that ERISA preemption in general, and *Gorman* in particular, do not apply here because this is a tax case (Pet. 24, 26). This argument misapprehends the issue in *Franchise Tax Board*. The Court there held that an action brought *by the State* to enforce its tax levies was not preempted by ERISA. The Court explained that "[s]ection 502(a) specifies which persons—participants, beneficiaries, fiduciaries, or the Secretary of Labor—may bring actions for particular kinds of relief. It neither creates nor expressly denies any cause of action in favor of state governments . . . ." 463 U.S. at 25. Therefore, "a suit by state tax authorities . . . does not 'arise under' ERISA." *Id.* The State's "well-pleaded complaint" provided a basis for relief unrelated to ERISA, and therefore its action was not preempted by ERISA. *Id.* at 26.

The critical fact in *Franchise Tax Board*—absent here—is that the suit was brought by the State. Therefore,

the suit was not of a sort that could have been brought under section 502(a), nor did it raise an ERISA claim as part of the affirmative case. By contrast, any state refund or injunction suit brought by respondents to challenge ASTA would raise a claim founded entirely on ERISA that could have been brought under section 502(a). Nothing in *Franchise Tax Board* implies that ERISA would not preempt such a suit by respondents if brought under Texas law. And, by the same token, the decision below does not hold that ERISA would preempt an action in state court brought by the State of Texas to enforce ASTA. The two cases are entirely consistent.

b. For similar reasons, the State errs in arguing (Pet. 21, 32) that the decision below conflicts with *Ashton v. Cory*, 780 F.2d 816 (9th Cir. 1986). In *Ashton*, the State argued that the Tax Injunction Act prohibited a benefit plan from bringing an action in federal court to declare a state tax invalid as violative of ERISA. Following this Court's direction in *Franchise Tax Board* (*see* 463 U.S. at 20 n.21), the court first inquired whether the plan had a speedy and efficient remedy in state court. 780 F.2d at 818-819. The court concluded that such a remedy existed because the plan had the opportunty to challenge the tax in its capacity as *defendant* in a pending state court action brought by the State to enforce its tax levies. *Id.* at 819.

The court in *Ashton* characterized the "pending state proceedings" brought by the State as the "critical" factor in its decision. *Id.* As here, the plan could not itself sue for a refund in state court, but the court held that the pending suit brought by the state afforded an adequate remedy. That the taxpayer's "remedy is defensive rather than offensive does not undermine its adequacy for purposes of the Tax Injunction Act." *Id.* at 820. The *Ashton* court took pains to emphasize, however, that the Tax Injunction Act requirement was satisfied only because

"the Board ha[d] already instituted collection proceedings for unpaid taxes . . . and the action [was] currently pending" in state court. *Id.* Where "no collection action had yet been filed in state court," it would be "specula[ive] whether state proceedings might be brought," and the possibility of a state collection suit would not provide a plain remedy under the Act. *Id.*

Having concluded that the terms of the Tax Injunction Act barred the plan's federal declaratory judgment action, the *Ashton* court proceeded to the second step of the inquiry delineated by this Court in *Franchise Tax Board* —whether Congress intended section 502 of ERISA to be an exception to the Tax Injunction Act. The court ruled that Congress did not so intend, and therefore it ordered the federal case dismissed for lack of jurisdiction.

The holding below is fully consistent with *Ashton*. This case turns on the first part of the two-pronged inquiry—whether respondents have a speedy and efficient remedy in state court. Like the plaintiff in *Ashton*, respondents cannot sue in state court to invalidate the tax. In contrast to *Ashton*, however, respondents are not defendants in a pending state proceeding in which they have the opportunity to challenge ASTA from a defensive posture. Accordingly, they have no speedy and efficient state remedy. That is the end of the matter. The Tax Injunction Act is inapplicable by its terms, and therefore this case does not present the question left open in *Franchise Tax Board* and decided in *Ashton*—namely, whether ERISA is an exception to the Tax Injunction Act. There is simply no conflict between the decision below and *Ashton*; the difference in result is attributable to the "critical" (780 F.2d at 819) factual difference concerning the pendency of a state enforcement action brought by the State.

5. *ERISA Expressly Abrogates the States' Eleventh Amendment Immunity.*

The State argues that certiorari is appropriate here because the court of appeals' failure to discuss the Eleventh Amendment constitutes "a radical and insupportable departure from constitutional jurisprudence and from this Court's clear and consistent precedents." Pet. 19. This argument is misconceived for two reasons.

First, even if the State's premise were correct, it would not justify review by this Court. If a lower court reaches a result that is incompatible with "this Court's clear and consistent precedents," and if the opinion offers no supporting discussion, there is little reason to anticipate that the decision will be followed by other courts. Although such a decision affects the parties to the litigation, it has only limited legal significance. To review that kind of decision would depart from the Court's usual certiorari standards in favor of a mere error-correcting function. *See Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974). Plenary review of a case merely to correct an error by the court below, as opposed to providing needed guidance to the lower courts, may be appropriate in some instances, but not in this unusual case, where review of the questions presented will not affect the ultimate resolution of the dispute between the parties. *See* pp. 7-9, *supra*.

Second, the State's premise is in any event incorrect. The decision of the court of appeals on these facts does not mark a "radical and insupportable departure" from Eleventh Amendment jurisprudence.

a. The district court held in its unreported decision in *Birdsong* (Pet. App. 43a-45a) that the structure and text of ERISA contemplate subjecting the states to suits in federal court like the one in this case. Section 502(a)(3) authorizes plan fiduciaries to sue to enforce their rights, and section 502(e)(1) establishes the federal courts as the exclusive forum for such suits. Those rights explicitly include the right to be free from "any State

tax law relating to employee benefit plans." Section 514(b)(5)(B)(i). The State is the only logical defendant in an action to enforce this latter right; the statutory text therefore expressly reflects a Congressional determination that the States could be brought into federal court to defend their taxes against the charge that they violate ERISA. And the statute explicitly provides that the court is empowered to grant injunctive relief and "other appropriate equitable relief," a paradigmatic example of which is restitution. Section 502(a)(3). Hence, ERISA is most reasonably read as having abrogated the State's Eleventh Amendment immunity from claims seeking equitable, restitutionary relief.

The State objects to this analysis largely on the ground that, because ERISA does not specifically mention "damages," it cannot be held to abrogate the State's Eleventh Amendment immunity from claims for damages. *See* Pet. 15-16. This objection misses the point. Respondents did not seek or receive "damages" in this litigation—that is, relief "measured in terms of a monetary loss resulting from a past breach of a legal duty." *Edelman v. Jordan*, 415 U.S. 651, 668 (1974).

Respondents simply sought a limited form of equitable relief—the return of their own money that had been unlawfully taken under duress by the State. This Court has recognized on more than one occasion that some kinds of monetary awards are not "damages," but instead are basic forms of equitable relief. Thus, the Court has found refunds of rent overpayments, and even lost wages awards, to be authorized by statutes that confer jurisdiction to award only equitable relief. *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 289-293 (1960); *see also Curtis v. Loether*, 415 U.S. 189, 196-197 (1974). "[R]estoring the status quo and ordering the return of that which rightfully belongs to" another is restitution, which "differs greatly" from damages and lies "within the recognized power and within the highest tradition of

a court of equity." *Porter v. Warner Holding Co.*, 328 U.S. at 402. In the same vein, the Court has specifically described tax refunds as a form of equitable relief, in the nature of restitution or unjust enrichment. *Edelman v. Jordan*, 415 U.S. 667, 669 (1974); *Ward v. Board of County Commissioners*, 253 U.S. 17, 24 (1920); *see also* Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Calif. L. Rev. 189, 310 (1981).

This Court has held that a congressional abrogation of Eleventh Amendment immunity must be "both unequivocal and textual." *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). To be sure, ERISA does not contain the words "Eleventh Amendment" or "state sovereign immunity," which would surely meet that standard. But the language used by Congress in ERISA was a reasonable way of achieving the objective of permitting claimants to receive restitution, as well as injunctive relief, in federal court.

Unless this Court insists on a talismanic formula for abrogation—one that could not possibly have been anticipated by Congress when it enacted ERISA in 1974—the language contained in sections 502 and 514 of ERISA is sufficiently unequivocal to require a state to make restitution of unlawfully collected funds. That conclusion is consistent with this Court's Eleventh Amendment holdings. The cases in which the Court has declined to find abrogation have involved broad claims that a state could be sued for damages for violating a federal statute; those claims sharply contrast with the limited abrogation of Eleventh Amendment immunity for restitution claims that is involved here. Where there is no claim that the statute waives state sovereign immunity or generally exposes the state to damages, an inquiry into use of the phrases "Eleventh Amendment," or "state sovereign immunity," or "damages" is misdirected. *Cf. Dellmuth v. Muth*, 491 U.S. at 233 (Scalia, J., concurring). ERISA

specifically provides for suit in federal court against the State to challenge state taxes and to receive "other equitable relief"; that is enough to effect a limited abrogation of Eleventh Amendment immunity for restitutionary relief.[8]

b. In any event, it is unnecessary to reach the ERISA abrogation issue in the peculiar circumstances of this case. As we have explained, the court of appeals concluded that respondents have no refund remedy in state court. Thus, this is not the typical case, where successful invocation of the Eleventh Amendment merely remits a plaintiff to the state courts. In one of its seminal Eleventh Amendment cases, the Court took pains to note that " 'the issue is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before *federal tribunals.*' " *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240 n.2 (1985) (emphasis in original), quoting *Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 293-294 (1973) (Marshall, J., concurring in result). In this case, however, the issue is not merely whether the state court or the federal court is the proper forum, but whether the State will be excused from paying a refund *anywhere.*

The Eleventh Amendment should not be read to bar a tax refund in federal court if there is no such remedy in state court. This Court has explained on several occasions that the essence of the Eleventh Amendment is the protection of state sovereign immunity. To the extent that the State has the power to preserve its immunity from monetary damages in state court, the Eleventh Amend-

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[8] The payment of pre-judgment interest to make the claimant whole is an element of equitable, restitutionary relief. The State offers no persuasive reason why this Court should review the decision below upholding the award of pre-judgment interest. *See* Pet. 39-42. Indeed, the State acknowledges that "the award of pre-judgment interest is generally discretionary with the trial court." Pet. 40-41. The manner in which the district court exercised that discretion in this case does not warrant this Court's attention.

ment (with limited exceptions) prevents plaintiffs from invoking the federal courts to circumvent that immunity. *See, e.g., Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2581 (1991); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 31 (1989) (opinion of Scalia, J.).

But here the State is not free to insist, even in its own courts, on a rule of sovereign immunity under which it collects taxes under duress and provides no mechanism for refunding them. That position runs afoul of the Fourteenth Amendment. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238, 2247-2250 (1990); *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930). If the State cannot maintain such immunity in its own courts, it necessarily follows that the Eleventh Amendment was not intended to grant it that immunity in the federal courts. At the very least, any claim to such immunity under the Eleventh Amendment was overridden by the adoption of the Fourteenth Amendment, which made unconstitutional a system that provides no opportunity to obtain a tax refund. *Cf. Pennsylvania v. Union Gas Co.*, 491 U.S. at 41-42 (opinion of Scalia, J.); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). In sum, the result reached by the Court below does not conflict with this Court's holdings in Eleventh Amendment cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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NOVEMBER 1991

APPENDICES

APPENDIX A

The Texas Administrative Services Tax Act, Tex. Ins. Code Art. 4.11A (Vernon Supp. 1987-1988), provides in pertinent part:

Art. 4.11A. Administrative Services Tax

Tax payment requirement

Sec. 1 Each insurance carrier receiving any form of administrative or service fee, consideration, payment, premium, fund, reimbursement, or compensation for performing or providing any service, function, or duty, or acting in any administrative, clerical, management, advisory, or technical capacity, or providing any claims or expense review, service, administration, management, payment, indemnification, or reimbursement, under an administrative service contract to be performed in this state, or on behalf of persons in this state, or for risks located in this state, and relating to any employer-employee, multiple employer-employee, self-insurance group, member, or other medical, accident, sickness, injury, indemnity, death, or health benefit plan, including but not limited to any medical, surgical, orthopedic, chiropractic, physical therapy, speech pathology, audiology, mental health, dental, hospital, workers' compensation, optometric, or health maintenance organization plan or program, but excluding any portion of such plan for which premiums for insurance are received by the carrier and are otherwise subject to taxation by this state under Article 1.14-1, 1.14-2, 4.10, or 4.11, Insurance Code, or Section 33, Texas Health Maintenance Organization Act (Article 20A.33, Vernon's Texas Insurance Code), shall pay to the State Board of Insurance as provided by this article for transmittal to the state treasurer an annual tax on the gross amount of administrative or service fees received by the carrier. This section does not apply to a person to the extent he receives an administrative or service fee, consideration, payment, premium, fund, reimbursement, or compensation, as provided

by this section, from a unit or units of local government, or from units of local government that have organized under The Interlocal Cooperation Act (Article 4413(32c), Vernon's Texas Civil Statutes) or Article 4413(32i), Revised Statutes, to provide group workers' compensation, health, accident, dental, disability, and life insurance solely to local government employees. This section does not apply to local mutual aid associations or fraternal benefit societies or associations.

Other tax payment requirement

Sec. 2. Each person, except an insurance carrier subject to Section 1 of this article, receiving any form of administrative or service fee, consideration, payment, premium, fund, reimbursement, or compensation for performing or providing any service, function, or duty, or acting in any administrative, clerical, management, advisory, or technical capacity, or providing any claims or expense review, service, administration, management, payment, indemnification, or reimbursement, under an administrative service contract to be performed in this state, or on behalf of persons in this state, or for risks located in this state, and relating to any employer-employee, multiple employer-employee, self-insurance group, member, or other medical, accident, sickness, injury, indemnity, death, or health benefit plan, including but not limited to any medical, surgical, orthopedic, chiropractic, physical therapy, speech pathology, audiology, mental health, dental, hospital, workers' compensation, optometric, or health maintenance organization plan or program, but excluding any portion of such plan for which premiums for insurance are received by an insurance carrier and are otherwise subject to taxation by this state under Article 1.14-1, 1.14-2, 4.10, or 4.11, Insurance Code, or Section 33, Texas Health Maintenance Organization Act (Article 20A.33, Vernon's Texas Insurance Code), shall pay to the State Board of Insurance as provided by this article for transmittal to the state treasurer an annual tax on the gross amount of

administrative or service fees received by the person. This section does not apply to a person to the extent he receives an administrative or service fee, consideration, payment, premium, fund, reimbursement, or compensation, as provided by this section, from a unit or units of local government, or from units of local government that have organized under The Interlocal Cooperation Act (Article 4413(32c), Vernon's Texas Civil Statutes) or Article 4413(32i), Revised Statutes, to provide group workers' compensation, health, accident, dental, disability, and life insurance solely to local government employees. This section does not apply to local mutual aid associations or to fraternal benefit societies or associations.

Definitions

Sec. 3. In this article:

(1) "Insurance carrier" or "carrier" means:

(A) every type of foreign and domestic insurer engaged in the business of insurance;

(B) every insurer that is licensed or operates under, or is required to be licensed or to operate under, Chapter 2, 3, 8, 11, 13, 14, 15, 16, 17, 18, 19, 20, or 22, Insurance Code, or Article 1.14-2, Insurance Code.

(C) a health maintenance organization that is licensed or operates under the Texas Health Maintenance Organization Act (Chapter 20A, Vernon's Texas Insurance Code); and

(D) an unauthorized insurer within the meaning of Article 1.14-1, Insurance Code.

(2) "Gross amount of administrative or service fee" includes:

(A) the total gross amount of all consideration, fees, payments, reimbursements, and all compensation received by the carrier or other person during the taxable year for

each and every kind of such service, activity, or function described either in Section 1 or Section 2 of this article; and

(B) the total amount of all claims and benefits paid to or on behalf of employers, multiple employers, employees, unions, beneficiaries, trusts, members, spouses, dependents, or other persons under a plan described in either Section 1 or Section 2 of this article.

(3) "Taxable year" is the calendar year, January 1 through December 31.

(4) "Person" includes an individual, corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, plan, or any other legal entity.

(5) "Administrative service contract" means a management contract, agency contract, or other written or oral contract or agreement under which the management, administration, or servicing of a plan or any portion of a plan, is provided by an insurance carrier or other person.

(6) "Plan" means any plan, fund, trust, or other program to the extent that the plan, fund, trust, or program is established or maintained for the purpose of providing persons, including spouses and beneficiaries, through insurance or otherwise, the benefits or coverage specified in Section 1 or Section 2 of this article.

Tax rate

Sec. 4. (a) There is imposed on each insurance carrier subject to Section 1 of this article and on each person subject to Section 2 of this article an annual tax equal to 2.5 percent of the gross amount of administrative or service fees respecting that carrier or person, but that insurance carrier or person is not liable for the payment of the gross amount of administrative or service fees as defined

in Section 3(2)(B) of this article to the extent that funds from which the insurance carrier or person is able to collect or retain that tax as provided by Subsection (c) of this section do not come into the possession or under the control of the carrier or person, or to the extent collection or retention is preempted by federal law. An insurance carrier subject to Section 1 of this article and a person subject to Section 2 of this article may not, on or after the effective date of this article, enter into any administrative service contract with any plan that does not provide for the retention or collection by the insurance carrier or person of the tax imposed on and required to be paid to the State Board of Insurance under this article.

(b) An insurance carrier subject to Section 1 of this article or a person subject to Section 2 of this article shall remit any tax owed under this section as specified in Subsection (a) of this section on behalf of itself and the plan or person for whom the service, administration, activity, management, or similar function is performed, and for that purpose is authorized and directed to collect or retain the amount of tax imposed by this article from funds, assessments, dues, premiums, or other money coming into its hands or under its control.

(c) Except to the extent preempted by federal law, there is imposed on each plan of the type described in Section 1 or 2 of this article an annual tax equal to 2.5 percent of the gross amount of administrative or service fees and that plan shall pay the tax to the State Board of Insurance for transmittal to the state treasurer. The tax provided by this subsection is imposed and is owed only to the extent a tax is not paid under Subsection (a) of this section.

(d) Notwithstanding any other provision of this article, the tax imposed under this article creates no duty and shall not be collected to the extent preempted or prohibited under the constitution of this state or the United States.

It is the intent of the legislature that this article not apply to any person, risk, or transaction to which it may not lawfully apply under the constitution of this state or the United States.

APPENDIX B

IN THE DISTRICT COURT OF
TRAVIS COUNTY, TEXAS
331ST JUDICIAL DISTRICT

No. 443,704

E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL AND SURGICAL INSURANCE PLAN, *et al.*,
Plaintiffs,

vs.

DOYCE R. LEE, Commissioner of the Texas State Board of Insurance, *et al.*,
Defendants.

ORDER

The Application of Plaintiffs in this cause for a temporary injunction came on regularly for hearing this day, due notice having been given. The parties appeared in person and by their attorneys. On considering the evidence received and the argument of counsel, the Court finds and concludes that Plaintiffs will probably prevail on the trial of this cause; that Doyce R. Lee, Commissioner of the Texas State Board of Insurance (the "Board"), Edwin J. Smith, Jr., Member and Chairman of the Board, David H. Thornberry, Member of the Board, James L. Nelson, Member of the Board (said Chairman and Members sometimes referred to herein collectively as the "Board"), Ann Richards, Treasurer of the State of Texas (the "Treasurer"), and Jim Mattox, Attorney General of the State of Texas (the "Attorney General") Defendants herein, intend to collect and allocate immediately for expenditure the taxes imposed under Article 4.11A and assess any available statutory penalties as soon as possible

and before the Court can render judgment in this cause; that if Defendants carry out these intentions, they will thereby alter the status quo and tend to make ineffectual a judgment in favor of Plaintiffs, in that (1) Defendants refuse to recognize Plaintiffs' standing to protest and obtain a refund as taxpayers and (2) the taxes paid under Article 4.11A are not subject to a statutory refund procedure or any legislative appropriation for refund judgments and that unless Defendants are deterred from carrying out these intentions, Plaintiffs will be without any adequate remedy at law in that Plaintiffs will be without means to recover the taxes paid pursuant to Article 4.11A.

IT IS THEREFORE ORDERED that:

(a) Doyce R. Lee, Commissioner of the Texas State Board of Insurance;

(b) Edwin J. Smith, Jr., Chairman and Member of the Texas State Board of Insurance;

(c) David H. Thornberry, Member of the Texas State Board of Insurance;

(d) James L. Nelson, Member of the Texas State Board of Insurance;

(e) Ann Richards, Member of the Texas State Board of Insurance; and

(f) Jim Mattox, Attorney General of the State of Texas,

Defendants herein, be, and hereby are, commanded forthwith to desist and refrain from enforcing against Plaintiffs Article 4.11A of the Texas Insurance Code and the Emergency Rules adopted by the State Board of Insurance in conjunction therewith and Defendants are further enjoined from attempting against Plaintiffs any collection of said tax or imposing any penalties in connection therewith.

Plaintiffs are ordered either to tender the principal amount of each Plaintiff's tax payment into the registry of this Court as, if, and when due under Article 4.11A

or to post good and sufficient surety bond in the principal amount of each Plaintiff's tax payment as, if, and when due under Article 4.11A, conditioned that Plaintiffs will abide by the decision which may be made in this cause and that they will pay all sums of money and costs that may be adjudged against them if the temporary injunction shall be dissolved in whole or in part.

IT IS FURTHER ORDERED that all monies paid into the Registry of the Court in this cause by the Plaintiffs shall be invested in a fully federally insured interest bearing account pending any future orders of this Court.

The clerk shall forthwith issue a temporary injunction in conformity with the law and the terms of this order.

IT IS FURTHER ORDERED that trial on the merits of this cause is ordered set for the 13th day of February, 1989.

SIGNED this 26th day of September, 1988.

/s/ Pete Lowry
Judge Presiding

APPENDIX C

RULE 29.1 STATEMENT

The following companies hold a direct or indirect ownership interest in US Sprint Communications Company:

UCOM, Inc.
GTE Communications Services Incorporated
United Telecommunications, Inc.
US Telecom, Inc.
GTE Corporation

US Sprint has the following subsidiaries that are not wholly owned:

Plessey-Telenet Limited
Sprint Networks USSR
ACE Telemail International, Inc. (Japan)

Kimberly-Clark Corporation has the following subsidiaries that are not wholly owned:

Carlton Paper Corporation Limited
Colombiana Kimberly S.A.
Colombiana Universal de Papeles S.A.
Comercial Papelera S. de R.L.
Distribuidora de Manufacturas Centro Americanas, S.A.
Hermex, A.P.
K.C.S.A. Holdings (Proprietary) Limited
Kimberly-Clark Australia Pty. Limited
Kimberly-Clark de Centro America S.A.
Kimberly-Clark Costa Rica, S.A.
Kimberly-Clark Far East Pte. Limited
Kimberly-Clark Malaysia
Kimberly-Clark de Mexico, S.A. de C.V.
Kimberly-Clark Philippines Inc.
Kimberly-Clark Thailand Limited
LTR Industries S.A.
Neenah & Menasha Water Power Co.

P.T. Kimsari Paper Indonesia
Spruce Falls Power and Paper Company Limited
YuHan-Kimberly, Limited

Shell Oil Company is owned by Shell Petroleum Inc., which is owned in turn 60% by Royal Dutch Petroleum Company and 40% by The Shell Transport and Trading Company, p.l.c.

Shell Oil Company has the following subsidiaries that are not wholly owned:

Fractionation Research, Inc.
GRAVPAC, Inc.
Heat Transfer Research, Inc.
Inland Corporation
Loop, Inc.
Lucky Chance Mining Company, Inc.
Mesbic Financial Corporation of Houston
Agripo Bioscience Inc.
Oil Companies Institute for Marine Pollution Comp
Oil Insurance Limited
Pecten Middle Eastern Services Company
Saudi Petrochemical Company
CRI International, Inc.
CRI Far East Trading Company Limited
CRI Europe S.A.
Catalyst Recovery Europe S.A.
Catalyst Technology Europe S.A.
CRI-SAM, Ltd.
CRI Ventures, Inc.
Catalyst Technology S.A.R.L.
Nippon CRI, LTD.
Criterion Catalyst Company
Pecten Portugal Company S.A.R.L.
Pecten Cameroon Company
Pecten Portugal Company S.A.R.L. Al Furat Petroleum Company
Taranaki Offshore Petroleum Company Limited

Columbia LNG Corporation
East Texas Salt Water Disposal Company
Grande Ecaille Land Company, Inc.
Cortez Capital Corporation
Van Salt Water Disposal Company
Wyoming Industrial Development Corporation
Butte Pipe Line Company
Dixie Pipeline Company
Explorer Pipeline Company
Locap, Inc.
Olympic Pipe Line Company
Plantation Pipe Line Company
West Shore Pipe Line Company
Wolverine Pipe Line Company
Premix/E.M.S. Inc.
United Scientific Incorporation

Greyhound Lines, Inc. has the following subsidiaries that are not wholly owned:

Amarillo Trailways Bus Center, Inc.
Continental Panhandle Lines, Inc.
GK Contract Services, Inc.
Greyhound Charter Service, Inc.
Greyhound de Mexico S.A. De, C.V.
Union Bus Station, of Oklahoma City, Oklahoma
Wilmington Union Bus Station Corporation

La Quinta Motor Inns, Inc. has the following subsidiary that is not wholly owned:

Beverage Services, Inc.

The Pillsbury Company is a wholly owned indirect subsidiary of Grand Metropolitan PLC.